



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA-R04-RCRA-2018- 0527; FRL-9991-61-Region 4]

Kentucky: Final Authorization of State Hazardous Waste Management Program

Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final authorization.

SUMMARY: The Environmental Protection Agency (EPA) is granting Kentucky final authorization for changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). The Agency published a Proposed Rule on September 21, 2018, and provided for public comment. Two substantive comments were received on Kentucky's proposed revisions. These comments are addressed in this Final Authorization.

DATES: This Final Authorization is effective *[insert date of publication in the Federal Register]*.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R04-2018- 0527. All documents in the docket are listed on the <http://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be

publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

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SUPPLEMENTARY INFORMATION:

A. What changes to Kentucky’s hazardous waste program is EPA authorizing with this action?

On April 13, 2018, Kentucky submitted a final complete program revision application seeking authorization of changes to its hazardous waste program in accordance with 40 CFR 271.21. EPA now makes a final decision that Kentucky’s hazardous waste program revisions that are being authorized are equivalent to, consistent with, and no less stringent than the Federal program, and therefore satisfy all of the requirements necessary to qualify for final authorization. For a list of State rules being authorized with this Final Authorization, please see the Proposed Rule published in the September 21, 2018 **Federal Register** at 83 FR 47858.

B. What comments were received on Kentucky’s proposed authorization and how is EPA responding to these comments?

EPA received two substantive comments on its September 21, 2018 proposed authorization of Kentucky’s hazardous waste program revisions. Specifically, EPA received adverse comments from the Sierra Club (“Commenter”). These comments are provided in the docket for today’s final action. See Docket ID No. EPA-R04-RCRA-2018-0527 at

www.regulations.gov. A summary of the adverse comments and EPA's responses are provided below.

Comment 1: The Commenter contends that EPA may not approve Kentucky's maximum concentration limit for selenium in groundwater at 401 KAR 39:090, Section 1(1), because it is higher than the Federal level in Table 1 of 40 CFR 264.94(a). Specifically, Kentucky's maximum concentration limit for selenium in groundwater is 0.05 milligrams per liter (mg/l), which is five times higher than the maximum Federal standard listed in 40 CFR 264.94(a), Table 1, which is 0.01 mg/l. The Commenter states that because this standard is "weaker" than the Federal analog, and because EPA has not established an "alternate limit" under the procedures of 40 CFR 264.94, the Kentucky concentration limit should not be approved.

Response 1: As the Commenter correctly notes, Kentucky replaces the federal Table 1 in 40 CFR 264.94(a) with its own Table 1 at 401 KAR 39:090, Section 1(1). In Kentucky's April 13, 2018 program revision application, Kentucky noted its replacement of the Federal Table 1 with its own Table, and also specified that its replacement Table is based on the current Federal Maximum Contaminant Levels (MCLs) for all listed constituents. EPA analyzed these substitute constituent concentrations and confirmed that they are equivalent to the federal MCLs.

In its Proposed Rule, EPA concluded that Kentucky's replacement Table 1 is "functionally equivalent" to the Federal table at 40 CFR 264.94(a). For the reasons set forth below, EPA affirms this determination and will proceed with authorization of Kentucky's State-specific groundwater concentration limit for selenium.

By way of background, the Federal groundwater concentration limits in 40 CFR 264.94(a), Table 1, were promulgated in 1982 and have remained unchanged since that time. *See* 47 FR 32274, 32350 (July 26, 1982). These groundwater concentration limits serve as a

trigger for corrective action for regulated units under post-closure care and were originally based on the health-based concentration limits found in the National Interim Primary Drinking Water Regulations under the Safe Drinking Water Act. *See* 47 FR at 32285. These National Interim Primary Drinking Water Regulations were later finalized to include the current MCLs, which were subject to notice and comment rulemaking and codified in 40 CFR part 141. EPA finalized the MCL for selenium in 1992 and set it at 0.05 mg/l. *See* 40 CFR 141.62(b). All MCLs are promulgated under the authority of the Safe Drinking Water Act and are required to be reviewed every six years. *See* 42 U.S.C. 300g-1(b)(9). The selenium MCL has undergone such review and EPA has determined that the 0.05 mg/l standard continues to be appropriate. *See* 82 FR 3518 (Jan. 11, 2017).

Although the regulations at 40 CFR 141.62 apply to “community water systems and non-transient, non-community water systems” as the Commenter correctly notes, EPA often relies on MCLs, in conjunction with health-based screening levels and background levels, for purposes of groundwater investigation and cleanup, with the goal of cleaning up groundwater to its maximum beneficial use, which is often as a source of drinking water. For example, Superfund cleanups conducted under the Comprehensive Environmental Response, Compensation and Liability Act utilize the Regional Screening Levels (RSLs) found at <https://www.epa.gov/risk/regional-screening-levels-rsls-generic-tables>, as well as the primary (health-based) MCLs, for purposes of establishing groundwater screening and cleanup levels. In addition, the Federal Coal Combustion Residuals (CCR) Rule uses the federal MCLs for purposes of setting groundwater protection standards. *See* 40 CFR 257.95(h). As a result, the Commenter’s statement that the selenium MCL is not relevant for purposes of groundwater protection is inaccurate.

Comment 2: The Commenter argues that EPA’s proposed authorization of the portions of Kentucky’s program that relate to EPA’s Checklist 235, which is the Federal regulation creating an exclusion from the definition of hazardous waste for certain coal combustion residuals, is inappropriate given that certain portions of the Federal Subtitle D CCR Rule have been vacated by the Court in *Utility Solid Waste Activities Group, et al. v. EPA* (D.C. Cir. Aug. 21, 2018).

Response 2: The language of 40 CFR 261.4(b)(4) revised in the 2015 CCR Rule was not challenged nor impacted by the decision in that case. As a result, this comment presents no basis to alter or re-evaluate EPA’s decision to proceed with authorization for the portions of Kentucky’s program that relate to Checklist 235.

C. What is codification and is EPA codifying Kentucky’s hazardous waste program as authorized in this rule?

Codification is the process of placing citations and references to the State’s statutes and regulations that comprise the State’s authorized hazardous waste program into the Code of Federal Regulations. EPA does this by adding those citations and references to the authorized State rules in 40 CFR part 272. EPA is not codifying the authorization of Kentucky’s revisions at this time. However, EPA reserves the ability to amend 40 CFR part 272, subpart S, for the authorization of Kentucky’s program changes at a later date.

D. Statutory and Executive Order Reviews

This final authorization revises Kentucky’s authorized hazardous waste management program pursuant to Section 3006 of RCRA and imposes no requirements other than those currently imposed by State law. For further information on how this authorization complies with applicable executive orders and statutory provisions, please see the Proposed Rule published in

the September 21, 2018 **Federal Register** at 83 FR 47858. The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This final action will be effective *[insert date of publication in the Federal Register]*.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of Sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

Dated: March 20, 2019.

Mary S. Walker,
Acting Regional Administrator, Region 4.

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